



May 30, 2000

Mr. Claude Drinnen
First Assistant City Attorney
City of Amarillo
P.O. Box 1971
Amarillo, Texas 79105-1971

OR2000-2108

Dear Mr. Drinnen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135699.

The City of Amarillo (the "city") received a request for a copy of the contract and proposal from JD Edwards for the Finance/Human Resources Payroll Applications system. You explain that the requested proposal does not exist. You claim that the requested contract is excepted from disclosure under section 552.110 of the Government Code. We have considered the exception you claim and have reviewed the document at issue.

Pursuant to section 552.305 of the Government Code, you notified JD Edwards of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). JD Edwards responded to your notice by asserting that the submitted contract contains proprietary information which is protected from disclosure under sections 552.101 and 552.110. Accordingly, we address JD Edwards's arguments against disclosure under these exceptions.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of “trade secret” from the Restatement of Torts, section 757, which holds a “trade secret” to be:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . .* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added].

Restatement of Torts § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the “trade secrets” branch of section 552.110 to requested information, we accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

Section 552.110(b) excepts from required public disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

After reviewing the documents and the arguments presented, we conclude that JD Edwards has not established that its contract with the city falls within the protection of section 552.110. We note that pricing information is generally not a trade secret because it relates exclusively to a *particular* circumstance rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Record Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. Gov’t Code § 552.022(a)(3) (contracts with governmental body expressly made public); *see also* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, we conclude that the city may not withhold any portion of the requested contract under section 552.110.

Section 552.101 protects information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision. JD Edwards argues that the requested contract is confidential pursuant to judicial decision. We are not persuaded, however, that the requested contract is made confidential by the cases relied upon by JD Edwards. *See Rainbow Group v. Texas Employment Commission* 897 S.W.2d 946 (Tex. App. 1995) (discussing whether requested information fell within ambit of specific confidentiality provision); *Burlington N. R. R. v. Public Util. Comm’n*, 812 F.2d 231 (5th Cir. 1987) (*rejecting* claim that Staggers Act preempted exercise of any state authority that results in public disclosure of rail contracts and recognizing potential public interest in disclosing terms of rail contracts outside the context of rail regulation); *see also McDonnell Douglas Corp. v. United States Equal Employment Opportunity Comm’n*, 922 F. Supp. 235, 241-242 (E.D. Mo. 1996) (holding that information is not produced to the government voluntarily when it is produced to obtain a contract or other benefit from a governmental body); *Racal-Miglo Gov’t Sys. v. SBA*, 559 F. Supp. 4 (D.D.C. 1981) (stating that governmental body’s ability to obtain future bid proposals will not be impaired by release of private company’s information because it is unlikely that companies will stop competing for government contracts); Open Records Decision No. 541 (1990) (stating that “[p]arties doing business with governmental body are presumed to know legal restraints that affect ability of governmental body to conduct business with complete freedom, including those imposed by the Public Information Act”). Accordingly, the city must release the submitted contract to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

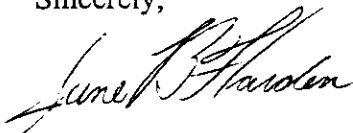
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/nc

Ref: ID# 135699

Encl. Submitted documents

cc: Ms. Joyce Jackson
SCT Corporation
1733 Harrodsburg Road
Lexington, Kentucky 40504
(w/o enclosures)

Mr. Thomas A. Lemmer
McKenna & Cuneo, L.L.P.
2770 Seventeenth Street, Suite 4800
Denver, Colorado 80202-1370
(w/o enclosures)